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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

**No. 184.**

MAX HALPERIN,

*Petitioner,*

*against*

UNITED STATES OF AMERICA.

## REPLY BRIEF ON BEHALF OF PETITIONER HALPERIN.

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*On the Brief.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## REPLY BRIEF ON BEHALF OF PETITIONER HALPERIN.

### I.

The government takes the position that Halperin's testimony before the Grand Jury and the trial court was "*not irreconcilably conflicting*, they are different" (government's brief, p. 74). Later the government claims that Halperin's answers before the Grand Jury "*might or might not be inconsistent* with his protestations at the trial of complete innocence. It was * * * a different answer" (p. 75 of the government's brief). (Italics ours.)

Inconsistency not a mere difference is required to warrant cross examination as to prior statements. "Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required" (III Wigmore on Evidence, 3rd Ed. Sec. 1040).

The acknowledgment that Halperin's claim before the grand jury *might not be inconsistent* destroys the very foundation for the right of the government to refer to it at all. Particularly must this be so when it is so manifest that the entire exposition of the inconsistency complex herein was colorable and only intended to serve as a vehicle for bringing upon Halperin's head the opprobrium of the jury not for some dubious inconsistency but for claiming the Fifth Amendment.

Moreover, no cross examination of Halperin was necessary to exclude inconsistency. The government already knew that Halperin was justified in claiming his privilege before the grand jury—that the claim was not perjurious. The government knew also that the grand jury minutes disclose that Halperin had told the grand jury that he was innocent and that he was invoking the Fifth Amendment because he had no right to cross examine witnesses and on advice of counsel (705-707).

Thus the government cannot fairly claim that it did not know prior to this cross examination of Halperin whether or not the vital factor of inconsistency existed. It did know. It knew that the factor was non-existent but nevertheless proceeded to stigmatize him as a Fifth Amendment defendant.

The government acknowledges that our request to charge "an innocent man may honestly claim that his answers may

tend to incriminate him" was "probably correct" (p. 42 of government's brief) and later states that "this court has recognized that this is a correct statement" citing the *Slochower* and *Ullmann* cases (government's brief, p. 83). Yet, the government does not explain why the trial court omitted all mention of Halperin's explanation for claiming the constitutional privilege before the Grand Jury. The jury's attention was completely diverted from all of Halperin's explanations with respect to his Grand Jury testimony, but attention was only focused on his claim of the privilege under the Fifth Amendment. Not a word appears in the court's charge to the effect that Halperin had testified before the Grand Jury that he was claiming the privilege as an innocent man and that before the Grand Jury he did not have the right to cross examine witnesses, to be confronted by the witnesses and that he was acting upon advice of counsel.

Even if there were some aspects of Halperin's explanation which the jury did have the right to disbelieve, the Court should have advised the jury that only if they disbelieved the defendant's evidence with respect to such explanation, might they consider his prior failure to testify against him on the score of credibility. (See, *Tatum* v. *United States* (Court of Appeals, Dist. of Col.), 190 F. 2d 612, 617.)

Moreover, it was a vital theory of the defendant Halperin's case supported by Halperin's detailed testimony, that in asserting his privilege of self-incrimination before the Grand Jury, he was acting as an innocent man and was invoking the protection that the Constitutional guarantee affords and is entitled to afford to an innocent person, and indeed, had so told the Grand Jury. This, itself, entitled defendant, Halperin, to the charges requested.

In *Marson* v. *United States*, 6 Cir. 203 F. 2d 904, 912, the Court stated:

> "With respect to a charge on the theory relied upon, it is the law that where a defendant in a criminal case presents a theory supported by the evidence and the Court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory."

Again, it was held in *People* v. *Lupa*, 305 N. Y. 448, that a charge is inadequate and fails of its purpose where it leaves the jury uncertain as to the law applicable to any part of the case. Furthermore, as stated in *People* v. *Levine*, 265 App. Div. 513, 39 N. Y. S. 2d 938, 939, 940, citing *People* v. *Odell*, 230 N. Y. 481, 487, and *People* v. *Kinney*, 2[illegible] N. Y. 389, 397:

> "The Court's charge 'should be a safeguard of fairness and of partiality and the guarantee of judicial indifference to individuals.' "

It may be noted at this juncture that the government's brief does not even attempt to controvert the claim in our main brief, that "* * * even if the government could initially inquire into the subject, Halperin's answers were productive of no basis, under the Raffel doctrine, for the trial court to invite the jury to disbelieve Halperin's testimony in chief." (Our main brief, p. 27).

We noted in support of this contention that this court, in the *Raffel* case, had taken occasion to specify that only if interrogation regarding Raffel's failure to testify at his first trial had produced evidence of discrediting motive might the jury deem his credibility impaired (p. 498 of 271 U. S.). We urged that since Halperin's trial testimony was shown to be entirely consistent with his course of conduct

before the Grand Jury that the condition precedent to impairment of credibility was non-existent and the court's charge vitally erroneous. Nowheres in its brief, does the government question our aforesaid views of the proviso in the *Raffel* case regarding credibility and the impact favorable to Halperin of the delimitation.

Moreover, the government's brief fails to impair the validity of our position that the very act of bringing to the jury's notice that Halperin had claimed the Fifth Amendment, thereby arousing the jury's prejudice against him, was itself an infringement upon the dictates of fair and impartial procedure which should govern the trial of a criminal case in the Federal Courts.

## II.

We respectfully call the court's attention to what we believe is an inconsistency in the government's brief. At pages 87 and 88 the government argues that the Brooklyn Grand Jury did not know the identity of the "Washington associate." Yet, at page 35 of the government's brief the testimony of Nancy Hain, Grunewald's personal secretary is referred to and there it appears that Miss Hain was "subpoenaed to appear before the Grand Jury on * * * May 13, 1952." This was the Brooklyn Grand Jury. The record shows that Miss Hain "went to the United States Attorney's Office in Brooklyn where she spoke to 'Mr. Parker and Mr. Kennedy and Mr. Percy' and she answered questions" they put to "her" (p. 533-534). It is thus obvious that the Brooklyn Grand Jury knew that Grunewald was the so-called "Washington associate." In addition, although it does not appear in the record, petitioner Grunewald was himself subpoenaed before the Brooklyn Grand Jury.

It, therefore, appears that the Brooklyn Grand Jury did not need Halperin's testimony to identify the "Washington associate." The net result must be that Halperin was a target of that Brooklyn Grand Jury.

Respectfully submitted,

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